

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2518 ^B _{Pys}

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Appellee,
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-against-
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GARY WARREN, a/k/a MICHAEL CHUN,
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Appellant.
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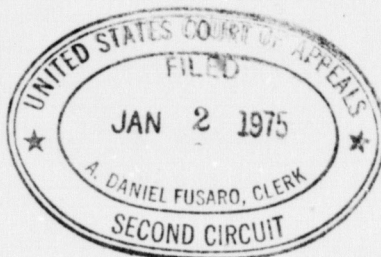
Docket No. 74-2518

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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Docket No. 74-2518

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether the District Court erred in holding that appellant Chun's* testimony that he was deported from Brazil on the basis of false information supplied to Brazilian authorities by American Agents did not constitute a prima facie claim of due process violation.

*In the hearing transcript, appellant is called both "Chun" and "Warren." For the sake of consistency, in this brief he is referred to throughout as "Chun."

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) rendered October 18, 1974, after a plea of guilty, convicting appellant Chun, also known as Gary Warren, of conspiracy to distribute cocaine, in violation of 21 U.S.C. §§812, 841, 952(a), and 960, and sentencing him to six years' imprisonment and ten years of special parole.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Jurisdiction Hearing

On June 25, 1974, the District Court conducted a hearing on appellant Chun's claim that the court's jurisdiction over him was void because his presence before the court had been obtained by the fraud and deceit of agents of the American government, in violation of his due process and Fourth Amendment rights. Chun took the witness stand, testifying that he was pursued through several South American countries and finally arrested and deported from Brazil to the United States by

South American authorities who were acting on the basis of false information provided them by representatives of the United States government. In November 1973, Chun, a citizen of the United States, was living in Bogota, Colombia (8*), when a group of American and Colombian agents came to his house to arrest him (8). After eluding the agents, Chun fled the country, going first to Ecuador and then to Brazil (8-9), where he resided with his wife from January 1 to June 12, 1974 (9). On or about June 12, 1974, Chun was arrested by Brazilian authorities, who informed him that they had been notified by American authorities that Chun was wanted for murdering an American agent and trafficking in drugs. (10). According to Chun, he was living in Brazil under a false passport, but the Brazilian authorities who arrested him said nothing which would indicate that this formed any part of the basis for his arrest or even that they were aware of this fact when he was arrested.

Chun was held by Brazilian authorities for four days, during which time a vice-consul from the American Consulate came to his cell and momentarily observed him without speaking (12). Although he was originally assured a deportation hearing by Brazilian authorities, after the four-day period he was taken to the airport in Rio de Janeiro by Brazilian agents, and flown to New York as a prisoner in handcuffs (14). There, he was transferred to the custody of a waiting Federal agent (14-15).

*Numerals in parentheses refer to pages of the transcript of the hearing.

The Government did not contest Chun's testimony. To the contrary, the prosecutor conceded:

I think that there was definitely communication between the United States Government Drug Enforcement Administration and the Brazilian Government that may have led to their evaluation that he [Chun] was an undesirable.

(5).

Stating that he was giving "maximum" weight to Chun's testimony (41), the District Judge held that the defendant had not established a prima facie claim of due process violation (42-43). Although the Brazilian authorities had indicated that they had arrested Chun on the basis of information from American government officials that Chun was wanted for murder and drug trafficking rather than for having an invalid passport, the District Court held that this latter fact justified Chun's arrest and deportation, and established that there had been no improper conduct by American agents (35-37).

B. The Guilty Plea and Sentencing

After the denial of the motion challenging the court's jurisdiction, and with the consent of the Government and the District Court that the issue raised in the motion was preserved for appeal (43), Chun changed his plea from not guilty to guilty of the conspiracy charged in the indictment. The District Court sentenced Chun to six years' imprisonment and ten years of special probation, the sentence to run concur-

rently with a sentence imposed by the United States District Court in Florida.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT CHUN'S TESTIMONY THAT HE WAS DEPORTED FROM BRAZIL TO THE UNITED STATES ON THE BASIS OF FALSE INFORMATION PROVIDED TO BRAZILIAN AUTHORITIES BY AMERICAN AGENTS DID NOT CONSTITUTE A PRIMA FACIE CLAIM OF DUE PROCESS VIOLATION.

The prosecutor in this case conceded that he thought there was "definitely" communication between American officials and the Brazilian government that may have "led" to that government's conclusion that appellant Chun was an undesirable and to his deportation to the United States. Chun's testimony, which the District Judge stated he was crediting for purposes of his ruling, was that the Brazilian authorities who arrested him in that country stated that they had been informed by American authorities that Chun had killed an American agent. Since this false accusation instigated the arrest which led to Chun's classification as an undesirable and his deportation from Brazil to the United States, it is clear that under this Court's holding in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the district court's jurisdiction over Chun was in violation of his due process and Fourth Amendment rights.

In Toscanino, this Court held that where force or fraud

has been used by American agents abroad to bring a defendant into the United States, the court's jurisdiction over him is invalid:

.... [W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud. See *In re Johnson*, 167 U.S. 120, 126, 17 S.Ct. 735, 42 L.Ed. 103 (1896); *Fitzgerald Construction Co. v. Fitzgerald*, 137 U.S. 98, 11 S.Ct. 36, 34 L.Ed. 608 (1890).

Id., 500 F.2d at 275.

Although Toscanino involved the use of force by American agents to bring that defendant into the United States, this Court was equally emphatic about the impropriety of the use of fraud for such a purpose. Moreover, the rationale given by this Court for its condemnation of use of force is equally applicable to the employment of fraud. The use of trick or device to secure a party's presence before the court has long been recognized to invalidate the court's jurisdiction over that party in civil proceedings. *In re Johnson*, 161 U.S. 120, 126 (1896); *Union Sugar Refinery v. Mathiessen*, 2 Cliff. 304; *Wells v. Gurner*, 8 B & C 769; *Snelling v. Watrous*, 2 Paige 314; *Williams v. Bacon*, 10 Wend. 636; *Metcalf v. [unclear]*, 41 Barb. 45; *Stein v. Valkenburg*, 3 B & E 65; *Williams v. Reed*, 5 Dutcher

385; Carpenter v. Spooner, 2 Sand. 917; Pfiffner v. Krapfell, 28 Iowa 27; Moynahan v. Wilson, 2 Flippen 130; Small v. Montgomery, 17 Fed.Rep. 865; Kauffman v. Kennedy, 25 Fed.Rep. 285.

In Toscanino, this Court, holding that "decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen," concluded that conduct which is illegal when employed by an ordinary citizen to bring an opposing party before the court in civil proceedings is equally illegal when used by the Federal government to bring a defendant in a criminal proceeding into the court's jurisdiction. Id., 500 F.2d at 274-275. Consequently, due process requires the court to take whatever action is necessary

... to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial [citations omitted].

Id., 500 F.2d at 272.

Where the Government, as in the present proceeding, has brought a defendant into the jurisdiction by illegal means,

... the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct....

Id., 500 F.2d at 275.

Consequently, the prosecution cannot proceed. Id., 500 F.2d at 275.

In addition to the constitutional prohibition, this Court, in Toscanino, also forbade such prosecutions as an exercise of

"supervisory power over the administration of criminal justice in the district courts within our jurisdiction" (Id., 500 F.2d at 276), on the ground that to permit "trials which are the outgrowth of fruit of the Government's illegality" would "debase the process of justice." Id., 500 F.2d at 276.

The District Court, in rejecting Chun's arguments, held that, since he was in Brazil on a false passport, that fact alone provided a valid basis for his deportation to the United States. However, there was no evidence whatsoever that the fact that Chun had an invalid passport was the reason for his arrest and deportation. To the contrary, the only evidence, undisputed by the Government, was that Chun's arrest by Brazilian authorities was based solely on the allegation made to them by American officials that Chun was wanted for murder and drug trafficking in the United States.

Similarly, the Government cannot validly argue that the arrest and deportation of Chun was valid because, in addition to the false accusation of murder, the American officials in Brazil also informed the Brazilian authorities that Chun was involved in drug trafficking. The claim that Chun had been involved in murder was by far the more serious of the two accusations made by the American officials. The Government introduced no evidence at the hearing which would establish that Chun would have been arrested, found to be an undesirable, and deported if Brazilian officials had not been deceived by American officials into believing he was a murderer, even if they

had been advised of the drug charge and the passport violation.

Under Toscanino, Chun has established a due process violation affecting the District Court's jurisdiction over him. This case should therefore be remanded for a hearing. If the Government cannot prove that Chun's arrest and deportation from Brazil was not affected by the false information American agents gave Brazilian officials, Chun's conviction should be vacated.

CONCLUSION

For the foregoing reasons, the case should be remanded to the District Court for a hearing on the validity of its jurisdiction.

Respectfully submitted,

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MICHAEL YOUNG,
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January 2, 1975

Certificate of Service

JANUARY 2, 1975

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Stark Bomberger